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MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-796

JAMES R. SCHLESINGER, SECRETARY OF DEFENSE, ET AL., APPELLANTS

V.

LT. ROBERT C. BALLARD, U.S.N.
APPELLEE

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE APPELLEE

CHARLES R. KHOURY, JR.
Attorney at Law
654 India Street Dock H
San Diego, California 92101

JOSEPH H. LEVIN, JR.
MORRIS S. DEES, JR.
CHARLES F. ABERNATHY
Attorneys at Law
119 South McDonough Street
Montgomery, Alabama 36104
Southern Poverty Law Center, Inc.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM,1973

No. 73-766

JAMES R. SCHLESINGER, SECRETARY OF DEFENSE, ET AL., APPELLANTS

V.

LT. ROBERT C. BALLARD, U.S.N.
APPELLEE

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE APPELLEE

Appellee adopts the statements of the opinion below, jurisdiction, constitutional provisions involved and questions presented as they are set forth in appellants' brief.

STATEMENT OF THE CASE

On June 30,1972, Lt. Ballard was scheduled to be discharged from the United States Navy after almost seventeen (17) years of continuous active duty. That separation was under the mandate of 10 USC 6382. Lt. Ballard was not discharged on that date, however, since on June 16, 1972 he had filed suit in Federal District Court alleging that if he were a female line officer instead of a male line officer he would be guaranteed a thirteen (13) year tenure as a female lieutenant rather than two "pass overs" as a male lieutenant and that the extra three years or so of guaranteed service would give Lt. Ballard the necessary twenty (20) years to retire at half-pay and other benefits for the rest of his life. Those benefits were assessed at in excess of $200,000.00. The District Court issued a temporary

restraining order preventing Lt. Ballard's discharge. Affidavits were filed by both sides, Lt. Ballard's service record was introduced into evidence by the government. A preliminary injunction issued after a hearing in the District Court and Lt. Ballard's discharge was further enjoined pending a final decision (J.S. App. A). After the government filed an answer and additional affidavits and after trial before the three judge court, that court rendered a decision on June 26,1973.

The three judge court found that statute to be violative of the due process clause of the Fifth Amendment insofar as that statute directs the involuntary discharge of male U.S. Navy officers prior to the expiration of thirteen (13) years of commissioned service while 10 USC 6401 guarantees thirteen (13) years tenure to similarly situated female naval officers.

The court found that the legislatively guaranteed tenure time of commissioned service granted to women under §6401 is an inherently suspect classification and the effect of the tenure provision was to invidiously discriminate against similarly circumstanced male naval officers who are mandatorily discharged before completing thirteen years of commissioned service.

The three judge court did not limit itself to the compelling interest test but also applied the rational basis test and found no rational basis to support the tenure granted female and denied male naval officers under 10 USC 6401 and 10 USC 6382 (p.18(a) of App. B J.S.).

The three judge court further found that the provisions of 10 USC 6382 are "legislative fiscal outlay saving devices for the weeding out of a surplus of U.S.N.

officers in a given grade before the vesting of retirement benefits" (Opinion of the three judge court, p. 15(a) of App. B, J.S.)

The three judge court found on substantial evidence , that appellee Lt. Ballard had served over seventeen (17) years in the Navy as an officer and enlisted man; that he had served with overall outstanding fitness reports and had been recommended for promotion in all those fitness reports. The court further found that if he had been allowed to serve 13 years as a Lieutenant, as he would if he were a woman, he would receive retirement benefits of approximately $200,000.00 as opposed to the $15,000.00 severance pay he was to receive under 10 USC 6382.

After the written decision, appellants moved the court for a "new trial" on the basis of two new affidavits. (J.S. App.C,

p. 21a-22a) The motion was denied(J.S.App. F. p. 27(a)).

ARGUMENT

I

SCOPE OF THE ISSUES PRESENTED

The advisability or necessity of weeding out unpromoted Naval officers is not at issue in this appeal. Contrary to the assumption of a substantial portion of the government's brief, Lt. Ballard is is not asking the Navy to justify its "up or out" personnel policy. That policy serves not only substantial military-national security interests, it also serves the men and women in the Navy by guaranteeing an opportunity for promotion and a lessening of dead end job assignments. 1/

1/ See Seymour, Promotion of Officers in the Naval Service,1956 JAG JOURNAL 5,6; Brief for Appellants at 14 n.16,15.

Lt. Ballard therefore admits a substantial military interest in weeding out unpromoted officers. Cf. Orloff v. Willoughby, 345 U.S. 83 (1952). In such matters the courts properly pay some deference to Congress' and the military's command decisions regarding what is best for the nation's security. See Bertelson v. Cooney, 213 F.2d 275,277 (5th Cir. 1954), cert. denied, 348 U.S. 856 (1955). Lt. Ballard, on the other hand, is not concerned with the advisability of selection-out policy, but rather with the introduction of an arbitrary factor -sex- into the promotion process. When such a constitutional attack is mounted, the Court must judge, without deference to military or Congress, whether the Constitution has been violated. Frontiero v. Richardson, 411 U.S. 677 (1973); Toth v. Quarles, 350 U.S. 11 (1955).

Of course, if some legitimate military

interest is found to support the sex classification drawn by Congress, then that would lead the Court to uphold the differing treatment of men and women by showing a compelling interest or even a rational basis for the statutory scheme. But the military's legitimate interest in weeding out of officers cannot be stretched and blurred, as the government attempts in its brief, to justify not only the selection out policy but the arbitrary sex classification. The weeding out policy applies to both men and women officers; the important question is whether sex is a pertinent consideration in deciding what procedures to apply in the weeding out process. This court very recently stated:

> We thus recognize that state recoupment statutes may betoken legitimate state interests. But these interests are not thwarted by requiring more even treatment....

James v. Strange, 407 U.S. 128, 141 (1972) (Emphasis added)

II

SEX-BASED DISTINCTIONS IN THE SELECTION-OUT PROCESS ARE WHOLLY IRRATIONAL

The statutes at issue here choose sex as the critical factor in applying the Navy's selection out policy. 10 U.S.C. § 6382 applies to "[e]ach officer . . . [when] he is considered as having failed of selection for promotion to the grade of lieutenant commander for . . . the second time." 10 U.S.C. § 6401 covers "[e]ach woman officer" whom the Navy wants to weed out. Sex by statutory design is therefore a significant factor in determining which selection out rules to apply.

It is difficult to ascertain with any sureness the specific factors on which the appellants rely to support this classification by sex. Their primary effort

appears to be to convince the Court that the statutes are "based on a combination of complex factors,"[2] factors so complex that the Court should not attempt to interfere with any isolated aspect. There is the hint that, unlike the issues in Frontiero v. Richardson, supra, "this case involves policies closely related . . . to the fighting morale and effectiveness of the armed forces," although it is never quite explained how the sex classification relates to the morale-boosting goal.[3] Despite having lost their case in the district court, the appellants see justification of the differing treatment as remarkably self-evident. One sentence is used to meet all constitutional objections:

2/ Brief for Appellants at 11.
3/ Id. at 10. It should be noted that both statutes -- the male and female provisions -- relate to the rate of promotion of young officers and hence both relate to naval morale. The issue is

> The lack of equivalent promotional opportunity for women in the past, the relatively small number of women officers in the service, and the public interest in increasing rather than decreasing the overall number of women in the armed forces, are substantial reasons in support of the differences in question. 4/

There is no discussion of precisely how these sex-based differing selection out procedures accomplish the above "goals".

A.

Indeed, any argument justifying the present statutes as remedial and protective legislation for women is plainly insubstantial. The sole difference in selection-out procedure is the number of years which are to be served before selection-out occurs. The protective and remedial aspects of setting a fixed time for women and a possibly speeded-up time

3/ (cont)
whether there is a reasonable basis for treating men and women differently in carrying out this "morale-boosting" policy.

4/ Id. at 19 (footnote omitted).

for men are tenuous and, more important, never intended by Congress.

Admitting that there are few women in the Navy and that they lacked promotional opportunity in the past, the fixed thirteen-year female selection-out statute in no way relates to or remedies those problems. After Kahn v. Shevin, ____U.S.____, 42 U.S.L.W. ____ (April 24, 1974), a number of existing statutes have suddenly acquired retoractive remedial purposes. The Court must decide which are legitimately remedial, as a wary consumer would sort true medicines out from the unsubstantiated elixirs.5/ In the present case an even casual reference to the legislative history of

5/ In great measure the drive for women's rights has been an attempt to escape the benevolent protection afforded by male-dominated society. See Johnston & Knapp, Sex Discrimination by Law: A Study in Judicial Perspective, 46 N.Y.U.L. REV. 675,697-702 (1971). See also UP FROM THE PEDESTAL (A.S. Kraditor ed. 1968).

§ 6401 shows that it is not a remedial statute. This section was originally enacted as § 207(j) of the Women's Armed Services Integration Act of 1948, 62 Stat. 368. Senate hearings on the bill clearly disclose that the purpose of the thirteen-year selection term for women was to duplicate what was then the same term for men.[6/] As even the appellants concede,[7/] therefore, Congress intended to put women on a substantial par with men on the selection-out issue. Section 6401 fails to give favor or protection for women because it was never designed or intended to have that effect.[8/]

6/ Hearings on S. 1103, S. 1527, & S. 1641 Before the Senate Committee on Armed Services, 80th Cong. 1st Sess. at 39. See Brief for Appellants at 16 & n. 19.

7/ Brief for Appellants at 17-18.

8/ The argument that §6401 was intended to remedy low female membership in the Navy and to provide increased advancement opportunitites over men, Brief for Appellants at 18-19, is further untenable

B.

A substantital portion of the Brief for Appellants is devoted to a description of the history and development of differing personnel policies for males and females in the Navy. Constitutional importance is attached to these personnel policies in a final footnote:

> Indeed, the differing ground rules governing a majority of women officers of the Navy, none of which are questioned here, strongly suggest

8/ (cont.) in light of the other provisions in the 1958 Act which limited the overall number of women, prohibited promotion for women beyond the level of lieutenant commander, and set age limits for women. These provisions were not eliminated until 1967. Act of Nov.8, 1967, 81 Stat. 374 § 1(14), 1(16), 1(18)(L), 1(19), 1(24). It is apparently the appellants' contention that while these direct prohibitions impeded the growth of female reserves, tiny § 6401 was all the time working, as intended, as a counter-force increasing the number of female personnel. In the repeal of the above prohibitions, the appellants see only a "lessening necessity" for the curative powers of §6401. Brief for Appellants at 19 n.28.

> that the two sexes are not "similarly situated" for purposes of invoking any claim of invidious discrimination.9/

The simple, and sufficient, response to this contention is that though men and women may not be similarly circumstanced with regard to other problems in the Navy, those different circumstances are irrelevant to the selection-out issue. Men generally have larger feet than women, but that does not make them dissimilarly circumstanced for weeding out purposes. The government makes no effort to argue that the other differing treatments according to sex are relevant to the issue sub judice.10/

9/ Brief for Appellants at 19 n.28

10/ As we discussed in the previous section, the interests supporting sex-oriented personnel decisions in other aspects of naval staffing -- such as the desire to increase number of females or restrict their jobs -- has an insubstantial relation to the narrow issue of setting a thirteen-year selection out date for women versus an approximate nine-year date for men.

The "differing ground rules" rationale is really only a variation of the administrative convenience argument advanced, and rejected, by the government in Frontiero v. Richardson, supra. Because we segregate women in other phases of Navy life, the appellants argue, it is easy for us to keep on treating them separately in administering our selection out system. As was the case in Frontiero, there is no evidence that the differing cut-off date for females' service is an easier administrative burden;[11] someone must still go through records to determine who failed promotion regardless of the year in which it is done.[12] In

11/ 36 L.Ed.2d at 593.
12/ Indeed, the separate categorization may add to the administrative burden by requiring multiple checking of records to determine who is eligible for mustering out in any given year.

In any event, administrative convenience will not justify a sex-based classification. Frontiero v. Richardson, supra, at 594 .

There is no evidence in this record that the administrative plan has a substantive policy impact. There is no evidence, for example, that the jobs performed by women lieutenants subject to § 6401 are in any way unique or different from those performed by men lieutenants. There is no evidence in this record showing that women lieutenants perform jobs requiring a fixed term, whereas males in the same type jobs must be treated with flexibility. While combat demands may call for an increased male officer supply, the statutory classification cuts beyond combat personnel and sweeps all males into one category for selection out purposes and the over-

whelming number of females into another category.[13] The argument that the variable selection-out term of males corresponds with combat needs is further undercut by the fact that some few women[14] officers are apparently subject to selection-out on the same basis as male officers; the jobs held by these women carry the professional status and respect associated with male-dominated occupations, but they require no participation in combat.[15]

13/ See Brief for Appellants, Table I (lines 7 and 8 vs. line 9).
14/ Less than five per cent of the women naval officers are subject to selection out under the same statute applied to males, 10 USC 6382(a). See Brief for Appellants, Table I, line 9.
15/ The disciplines involved are medicine and law. See Brief for Appellants, Table I, line 9.

C.

The appellants also argue that the relief accorded by the district court would, if extended in subsequent cases to all other male officers subject to selection out, interfere substantially with the Navy's personnel system and its combat readiness. Since the relief ordered allegedly interferes with combat readiness, the appellants intimate, reasoning backwards, that the statute eliminated by the district court must also have related to military preparedness.

The reasoning backward process fails in this situation where constitutional issues are at stake. Before President Truman's term, the armed services were substantially segregated internally according to race. Had that policy been adjudicated in this court it most certainly would have been held unconstitutional, and doubtless a

court order to desegregate the forces would have had a substantial adverse impact on military preparedness. But the policy, despite the relief order's disruptive effect on national defense, would have been unconstitutional and it would have been this Court's duty to declare it so. Cohens v. Virginia, 6 Wheat. 264 (U.S. 1821). 16/

There may be some disruption of the naval promotion system due to a finding that these statutory classifications are unconstitutional. While that may require that relief be tailored so as to interfere least with naval defense operations, it does not require that the statutes be

16/ Similar arguments were advanced in the early post-Brown school desegregation cases. School boards or governors regularly argued that the disruption occasioned by desegregation proved that the states had a legitimate educational interest in maintaining segregation. See Bush v. Orleans Parish School Board, 364 U.S. 500 (1960); Cooper v. Aaron, 358 U.S. 1 (1958); Southern Manifesto, RACE REL. L. RPTR. 435-47 (1956).

found constitutional and no relief granted.

III

THE RELIEF GRANTED BY THE DISTRICT COURT WAS APPROPRIATE;ALTERNATIVELY PLAINTIFF SHOULD BE RETAINED WHILE THE CONGRESS IS GIVEN AN OPPORTUNITY TO ACT

Whenever a court finds an unconstitutional classification and unequal treatment, it must then decide whether to remedy the defect by declaring the statute equally operative upon all persons similarly situated or by declaring the statute inoperative as to all of them. Skinner v. Oklahoma, 316 U.S. 535 (1942). In the present case the court must decide whether both male and female lieutenants will now be subject to §6401 or to §6382(a).

Congressional intent should guide the court on this issue. As Mr. Justice Harlan wrote in Welsh v. United States, 398 U.S. 333,355 (1970), the court is "to decide whether it more nearly accords with

Congress' wishes to eliminate its policy altogether or extend it in order to render what Congress plainly did intent, constitutional." See Iowa-Des Moines National Bank v. Bennett, 284 U.S. 239 (1939) (per Brandeis,J.); Brief for Appellants at 63-67 in Frontiero v. Richardson, supra.

Looking at Congress' actions on the selection our issue, it is of course clear that Congress legislated that the predominant number of naval officers should be governed by §6382(a), because men make up the majority of naval leaders.[17]/ It might be thought than that Congress would prefer that §6382(a)'s "twice failed" criterion be applied to both males and females. Such a conclusion is seriously eroded by Congress' understanding that "twice failing" would occur only after

17/ Brief for Appellants, Table I

thirteen years of service, for that is the statutorily prescribed service period for proceeding past the grade of lieutenant. See 10 USC §5768(a)(twelve year service time for lieutenants); Brief for Appellant at 16 n. 19. Congress so assuredly believed that "twice-failing" would take thirteen years, that it wrote that figure directly into the women's selection-out statute, 10 USC 6401, for the avowed purpose of making the female selection-out period equal to that of male lieutenants.[18]/

This fact supports the proposition that the court should follow the thirteen year period which Congress had in mind for both

18/As the appellants admit the speeded-up selection-out of male lieutenants has occurred because the President suspended Congress' time-in-grade requirements. This speeded up service has now become somewhat usual , but is clearly not what Congress foresaw. See Hearings, supra, note 6, Brief for Appellants at 16.

male and female officers at least until Congress decides otherwise.[19]/

IV

THIS APPEAL SHOULD BE DISMISSED FOR LACK OF A PROPERLY PRESENTED FEDERAL QUESTION

In the court below the defendants were given two opportunities to argue the merits of their case. The court heard all parties before entering its preliminary injunction. (Memorandum Granting Preliminary Injunction, J.S. at 1a (Appendix A)). In that memorandum the court specifically directed that

> the defendant's are requested to file herein within thirty days from the date hereof, such Answer and further showing to the issues of plaintiff's complaint as they shall deem appropriate, else be in default herein. [Id.at 8a]

The defendants, however, failed to provide all their evidence for the scheduled trial on the merits, instead filing a Motion for New Trial in which a substantial

19/Cf. Brief for Appellants at 18 n. 24

portion of their evidence and argument was offered. Most of the information relating to the defendants' case was related in affidavits offered by Rear Admiral G.E.R. Kinnear, II, U.S.N. and Captain E.R. Fink, U.S.N. The defendants-appellants themselves must consider these affidavits crucial because they are relied upon in the brief on several occasions. Moreover, their Brief notes that the "reasons supporting the classification here which were not fully presented to the court prior to the Motion for a New Trial... are set out in Part II of this brief"; Part II comprises nine of the thirteen pages of appellants' brief which were devoted to "Argument." Brief for Appellants at 11-19.

For this court to consider these additional arguments and thus have before it all of the relevant evidence regarding

these statutes, the Court must first find that the district court erred in refusing to grant a new trial based on the new affidavits.[20] There can be no doubt, however, that the new trial motion was correctly denied. There were no specific grounds for a new trial asserted anywhere in defendants' motion or in the affidavit of Captain Fink attached thereto. Admiral Kinnear's affidavit was filed a full month after the Fink affidavit, after the filing of the Judgement, and after plaintiff had filed his opposition to the new trial. A motion for new trial grounded upon newly discovered evidence will not be granted unless the facts discovered are of such a nature that they would probably change the outcome; such facts are actually

20/ Defendants filed a separate notice of appeal in response to the court's refusal to grant a new trial. Jurisdictional Statement, Appendix G.

newly discovered and could not have been discovered earlier by proper diligence and the facts are not merely cumulative or impeaching (English v. Mattson, 214 F. 2d 406). Denial of defendants' motion for new trial based on affidavits which contained material in the nature of after-discovered evidence was not an abuse of the court's discretion where such evidence could have been discovered if due diligence had been exercised by the defendants (Niedland v. United States, 338 F.2d 254).

A perusal of the affidavit of Captain Fink, attached to defendants' motion (17(a) of Appendix) reveals no claim of newly discovered evidence.[21] The "evidence" re Ballard's fitness reports

21/Much of the affidavit and Appellants' brief is devoted to the assertion that some women were subject to 10 USC 6382 (p.22a of Appendix). The government has never stated, however, that any woman

in the Fink affidavit was simply in error and was sharply controverted in plaintiff's opposition to Motion for New Trial filed on July 16,1973. The defendants then and appellants now raise the spectre of millions of dollars of cost to the Navy if 10 USC 6382 is invalidated. The figures of those persons "affected" by the Ballard decision are no longer correct as only a small fraction of the alleged 204 officers in Ingram v. Richardson, 73-257-S, filed June 29,1973 have elected to stay in the service rather than be discharged under 10 USC 6382.

What appellants tried to do in their motion for new trial and again here in the Supreme Court is to use a Pandora's Box argument to sway the lower court from

21/(cont.) officer had been discharged pursuant to 10 USC 6382; therefore the three judge court's finding to that effect has never been challenged.

maintaining its ruling and this court from affirming that ruling. The problem is twofold in that the facts alleged are incorrect and secondly, they should be limited to Ingram v. Richardson, supra. Certainly, however, the appellants have not properly presented a federal question to this court by way of affidavits never tested by the rigors of trial. A dismissal[22]/ of this appeal then would still allow the defendants in Ingram v. Richardson supra to put their evidence, hastily attached to this case, to the test of trial and thereby present this court with an appellate record of a federal question properly presented and tried below.[23]/

22/ See DeBarker v. Brainard,396 US 28 (1969); Mattiello v. Connecticut,395 U.S. 209 (1969); Poe v. Ullman 367 U.S. 497 (1961).

23/ Lt. Ballard will have the 19 1/2 years service necessary to retire on or about February 16,1975. Congress is considering hearings on a bill which

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgement of the district court be either affirmed or that this appeal be dismissed for lack of a properly presented federal question.

CHARLES R. KHOURY,JR.

JOSEPH J. LEVIN,JR.

MORRIS S. DEES,JR.

CHARLES R. ABERNATHY

Attorneys for Appellee

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23/ (cont.)
ease the discrimination of 10 USC 6401, vest retirement equity at a 10 year point in active duty and make mandatory, instead of discretionary, retention when one is within 2 years of retirement. H.R. 12405, January 30,1974, 93d Congress, Second Session.